



BRB No. 16-0536 BLA

VELDA MALCOMB)	
(o/b/o RONALD D. MALCOMB))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
POTOMAC COAL COMPANY)	DATE ISSUED: 06/30/2017
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Kathy L. Snyder and Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2012-BLA-5039) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent miner's claim filed on August 3, 2010, pursuant to provisions of the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ This case is before the Board for a second time. In its previous decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that: the miner worked at least fifteen years in underground coal mine employment; the miner suffered from a totally disabling respiratory or pulmonary impairment; claimant² established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and claimant further invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis.³ *Malcomb v. Potomac Coal Co.*, BRB No. 14-0436 BLA, slip op. at 2 n.4 (Sept. 30, 2015) (unpub.). However, the Board vacated the administrative law judge's determination that employer established rebuttal of the Section 411(c)(4) presumption, holding that the administrative law judge did not fully address the rationales underlying the opinions of employer's experts. The Board therefore remanded the case to the administrative law judge for reconsideration of rebuttal of the Section 411(c)(4) presumption. *Id.* at 7.

On remand, the administrative law judge determined that employer rebutted the existence of both legal and clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), (B). Relying on the findings he made as to the existence of pneumoconiosis, the administrative law judge further found that employer rebutted the presumption that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge denied benefits accordingly.

On appeal, claimant argues that the evidence is insufficient to establish rebuttal of the existence of legal pneumoconiosis and total disability due to pneumoconiosis.

¹ The miner filed an initial claim for benefits on May 8, 1973, which the district director denied because the miner did not establish any element of entitlement. Director's Exhibit 1. The miner filed a second claim for benefits on January 7, 2004, which was denied by Administrative Law Judge Jeffrey Tureck on March 6, 2006, because the evidence did not establish total disability. Director's Exhibit 2. The miner did not take any further action until he filed the current claim. Director's Exhibit 4.

² Claimant is the surviving spouse of the miner, who died on November 12, 2011. Director's Exhibit 34. She is continuing to pursue this claim on his behalf. *Id.*

³ Under Section 411(c)(4), a miner's totally disabling respiratory or pulmonary impairment is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4)(2012), as implemented by 20 C.F.R. §718.305.

Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Once claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,⁵ or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201."⁶ 20 C.F.R. 718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). With respect to the administrative law judge's finding that employer rebutted the existence of legal pneumoconiosis, claimant initially contends that because the burden of proof is on employer, the administrative law judge erred in focusing on the sufficiency of Dr. Rasmussen's diagnosis of legal pneumoconiosis and whether there

⁴ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-201 (1989) (en banc).

⁵ Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

⁶ Because claimant has not raised a specific allegation of error concerning the administrative law judge's finding that employer rebutted the presumed existence of clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(B), we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 21-22.

were other conditions that could explain the miner's respiratory or pulmonary impairment. Claimant also asserts that the administrative law judge should have discredited the opinion of Dr. Zaldivar because his explicit reliance on radiographic evidence to exclude a diagnosis of legal pneumoconiosis is contrary to the regulations.

Although claimant accurately states that the administrative law judge found that Dr. Rasmussen's opinion was "less persuasive" because the physician "was ultimately uncertain whether [claimant] suffers from legal [pneumoconiosis] at all,"⁷ the administrative law judge explicitly found that "Dr. Zaldivar's thorough explanation alone is sufficient to rebut the presumption of legal pneumoconiosis by a preponderance of the evidence."⁸ Decision and Order at 22, 24. Thus, the administrative law judge did not ultimately rely on his weighing of Dr. Rasmussen's diagnosis of legal pneumoconiosis to find that employer rebutted the existence of the disease.

We further reject claimant's allegations of error regarding the administrative law judge's finding that Dr. Zaldivar's opinion is sufficient to rebut the existence of legal pneumoconiosis. Dr. Zaldivar examined the miner in conjunction with this claim and reviewed his medical records. Employer's Exhibit 1. In his written report, Dr. Zaldivar concluded:

There is no evidence in this case to diagnose legal pneumoconiosis. The clinical situation of [the miner] agrees very well with the histories documented on the record. He suffers from a restriction of the vital capacity because his chest muscles and all muscles are extremely weak and

⁷ At his deposition, Dr. Rasmussen identified other factors that could have caused the miner's respiratory condition, including smoking, radiation therapy, and repeated aspiration pneumonias. Employer's Exhibit 2 at 13, 21-23. When asked why he diagnosed legal pneumoconiosis, Dr. Rasmussen testified, "I did so primarily because I couldn't exclude it as a cause of his impairment. Coal mine dust is also capable of causing a restrictive defect and a reduced diffusing capacity." *Id.* at 20. He further stated, "I think it's really kind of a long shot that he has coal-induced lung disease at this stage. I think I said significant, but when I really look it over, if I were to do it again, I don't think that I would say that for sure." *Id.* at 23. Dr. Rasmussen also indicated that he could not say whether legal pneumoconiosis caused any significant part of the miner's restrictive impairment. *Id.*

⁸ The administrative law judge also discredited an opinion by Dr. Castle that claimant does not have legal pneumoconiosis because he required the presence of significant interstitial fibrosis on x-ray to identify coal dust exposure as a causal factor in claimant's restrictive lung disease. Decision and Order at 24; Employer's Exhibit 5.

unable to generate sufficient pressure for the deepest inhalation and exhalation that he could otherwise achieve. The blood gas abnormality and low diffusion are the result of the chronic damage to the lungs incurred through the recurring pneumonias. This damage is clearly visible in the chest x-ray as increased interstitial inflammation.

Id.

Dr. Zaldivar testified at his deposition that coal mine dust can cause restrictive lung disease and concurred with Dr. Rasmussen's view that "when coal mine dust causes a restrictive defect and a decreased diffusion capacity, typically you also see radiographic changes."⁹ Employer's Exhibit 10 at 25. When asked whether his agreement with Dr. Rasmussen "mean[s] that coal-mine dust exposure cannot cause disease without radiographic changes," Dr. Zaldivar replied: "Well, no it doesn't. When we're dealing with restrictive disease, you must have radiographic changes because one is a [sic] dealing with space-occupying lesions then." *Id.* at 25-26. Dr. Zaldivar further explained that there were two reasons for the miner's low vital capacity and restriction, stating "[o]ne reason was recurrent aspirations which were causing inflammation and localized fibrosis within the lungs." *Id.* at 26. As to the second reason, Dr. Zaldivar indicated that strokes caused the miner "to become weaker and weaker and weaker" and that "[i]t is the muscular weakness which does not allow the lung to inflate properly." *Id.* at 27. Dr. Zaldivar also commented that the miner's vital capacity and blood gas abnormalities are "very well explained by all of the physical problems that occurred over the years[.]" notably the miner's strokes and cancer. Employer's Exhibit 10 at 29-30. Dr. Zaldivar concluded that even if the miner had clinical pneumoconiosis, he would still find that the miner's respiratory impairment was not related to coal dust exposure. *Id.* at 32.

The administrative law judge accurately summarized Dr. Zaldivar's medical report and deposition testimony, and explicitly considered whether claimant was correct in asserting that Dr. Zaldivar requires a diagnosis of clinical pneumoconiosis to diagnose legal pneumoconiosis. Decision and Order at 23. The administrative law judge concluded that, in the present case, Dr. Zaldivar did not exclude coal-mine dust exposure as a causal factor in claimant's restrictive disease because claimant's chest x-rays were not read as positive for clinical pneumoconiosis. *Id.* We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000);

⁹ In response to a question at his deposition as to whether it is typical to see radiographic changes when coal-mine dust causes a restrictive defect and a decrease in diffusion capacity, Dr. Rasmussen responded: "Yes, I think by far that would be the most likely scenario." Employer's Exhibit 2 at 20.

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Although Dr. Zaldivar noted that claimant's x-rays were negative for clinical pneumoconiosis, the administrative law judge correctly observed that Dr. Zaldivar also explained that the changes seen on x-ray were consistent with the effects of radiation therapy and chronic aspiration pneumonia, and that these factors caused claimant's restrictive lung disease. Decision and Order at 23; Employer's Exhibit 10 at 15-19. The administrative law judge also permissibly determined that Dr. Zaldivar's opinion was corroborated by the opinions of Drs. Castle and Rasmussen, who attributed the x-ray findings to radiation therapy and recurrent pneumonia, and by treatment records showing a history of both radiation treatment for throat cancer and recurring aspiration pneumonia. Decision and Order at 22. Accordingly, we affirm the administrative law judge's crediting of Dr. Zaldivar's opinion, and his finding that it was sufficient to establish rebuttal of the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).¹⁰ See *Minich*, 25 BLR at 1-159.

We therefore affirm the administrative law judge's determination that employer rebutted the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). Based on our affirmance of the administrative law judge's finding that employer affirmatively proved that the miner does not have pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits.¹¹ 20 C.F.R. §§718.3, 718.202; see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

¹⁰ In evaluating whether employer rebutted the presumed existence of pneumoconiosis, the administrative law judge complied with the Board's remand instruction to address the miner's treatment records. Decision and Order at 3-4, 19-20. The administrative law judge found that they did not contain a reasoned or documented determination that the miner's pulmonary conditions arose out of coal mine employment. *Id.*

¹¹ In light our affirmance of the administrative law judge's finding that employer rebutted the presumed existence of pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), we need not address claimant's allegations of error in the administrative law judge's finding that employer established "that no part of the miner's respiratory or pulmonary impairment was caused by pneumoconiosis" at 20 C.F.R. §718.305(d)(1)(ii). *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge